

DECISION



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IANNICELLI
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-210168

DATE: May 23, 1983

MATTER OF: Transiac Corporation

DIGEST:

1. Protest--alleging that awardee was nonresponsive to IFB calling for brand name product or equal because of failure to submit technical proposal or published technical brochures as required under terms of IFB--is denied. IFB afforded offerors of "equal" product broad latitude as to type of information to show that offered product is equal to named product and information submitted by awardee with bid was sufficient for agency to determine that awardee's product met salient characteristics listed in IFB and for evaluation purposes.
2. Protest--alleging that awardee was nonresponsive to brand name or equal IFB because of failure to submit with bid a list of firms or institutions which had previously used offered product--is denied. Awardee's bid referenced use of product by an institution which was sufficient for agency's technical personnel to ascertain that product offered was not developmental or prototype model--the stated purpose of this requirement. Moreover, contrary to protester's assertions, there was no requirement that item had to be used under contract rather than under loan arrangement nor any requirement for testing of product by prior user.
3. Protest that awardee should have been rejected for allegedly poor performance and late deliveries under prior contracts is dismissed. This allegation concerns matter of awardee's responsibility, and GAO does not review contracting agency's affirmative determination of responsibility in these circumstances.

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4. Protest issues raised after protester's receipt of agency report on original timely protest are dismissed as untimely. Later-raised issues must independently satisfy timeliness rules of our Bid Protest Procedures (4 C.F.R. part 21 (1983)). Here, later-raised issues concern awardee's responsiveness and should have been known to protester after the public opening and its protest filed with knowledge of bid's content. Since they were first raised more than 2 months after the initial protest was filed, they are untimely under section 21.2(b)(2) of our Procedures.

Transiac Corporation (Transiac) protests award of a contract to LeCroy Research Systems Corporation (LeCroy) by the Defense Nuclear Agency pursuant to invitation for bids (IFB) No. DNA002-83-B-0007. Pursuant to the IFB, LeCroy was awarded a contract to supply item 0001, calling for 150 transient digitizers (Transiac Model 2001 or equal was required); award of other items pursuant to the IFB has not been protested. Transiac contends that LeCroy's bid was nonresponsive because: (1) LeCroy did not submit sufficient descriptive material or a technical proposal to show that the transient digitizers offered by LeCroy were "equal" to the Transiac Model 2001; (2) LeCroy did not submit a list of firms or organizations using or having used the product offered by LeCroy as required by the IFB. Transiac also argues that LeCroy has a record of poor performance and late delivery on prior contracts and, therefore, does not "possess satisfactory financial and technical ability and equipment and an organization to insure satisfactory completion of any resultant contract" as required in paragraph L-30 of the IFB.

We conclude that the protest is without merit in part and for dismissal in part.

Transiac's first argument, dealing with insufficient descriptive literature and lack of a technical proposal, centers on paragraphs L-35 and L-36 of the IFB. Paragraph L-35 stated, in pertinent part:

"(c)(1) If the bidder proposes to furnish an 'equal' product, the brand name, if any, of the product to be furnished shall be inserted

in the space provided in the Invitation for Bids, or such product shall be otherwise clearly identified in the bid. The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his bid, as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS. The purchasing activity is not responsible for locating or securing any information which is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the salient characteristics requirements of the Invitation for Bids (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity."

Paragraph L-36 stated, in relevant part, that:

"Developmental or prototype models offered as an 'EQUAL' are not acceptable. An offered 'EQUAL' must be a product proven in service by past performance. Offers setting forth an 'EQUAL' must be accompanied by a list of firms or organizations using or having used the offered product as well as the data required by L-35 entitled 'BRAND NAME OR EQUAL (1973 APR).' The data will be in the form of a technical proposal giving full details. Merely repeating the specifications of the Solicitation and Offer or claimed specifications of the offered 'EQUAL' product will not give enough information for the Government to determine the

equality of the offer. The offeror's technical proposal must clearly show in the form of published technical brochures, cuts, illustrations, drawings or other information, how the 'EQUALITY' criteria is to be satisfied. * * *

Transiac argues that paragraph L-36 required LeCroy to submit a technical proposal, as well as published technical brochures, to show that the offered product was equal to the named Transiac Model 2001. According to Transiac, since LeCroy submitted neither of these items, its bid did not contain sufficient information for the contracting agency to determine that LeCroy's transient digitizers were equal, or better than, the named Transiac model; therefore, LeCroy's bid was nonresponsive. We do not agree with this conclusion.

Solicitations should be read as a whole and construed in a reasonable manner. Tymshare, Inc., B-198020, October 10, 1980, 80-2 CPD 267. We note that paragraph L-35 is entitled "Brand Name or Equal" and paragraph L-36 is entitled "Additional Brand Name or Equal." Therefore, the paragraphs should be read together to ascertain what the IFB required of a bidder which offered an equal product in order for the contracting agency to evaluate the equality of that product. While the third sentence in paragraph L-36 (quoted above) states that a technical proposal is required, it is evident from the fifth sentence of paragraph L-36 that the required technical proposal could be composed of "published technical brochures, cuts, illustrations, drawings or other information." The IFB did not require that a technical proposal be in any certain form so long as the agency was able to determine that the product offered met the salient characteristics requirement of the IFB as indicated in paragraph L-35. In any event, except for step one of a two-step, formally advertised procurement, technical proposals are inappropriate in a formally advertised procurement.

While Transiac alleges that LeCroy did not submit published technical brochures, LeCroy's bid offered LeCroy Model No. 8818/8103 and contained a detailed description of LeCroy's product and a comparison between the IFB's listed salient characteristics and those of LeCroy's product. Whether this detailed statement of the salient characteristics of the LeCroy product was published is not relevant in view of the broad latitude afforded offerors under paragraphs L-35 and L-36. Moreover, this information was


sufficient for the Defense Nuclear Agency to determine that LeCroy's product met or exceeded all the salient characteristics of the Transiac model listed in the IFB for evaluation purposes. See SEG Electronics Corporation and Boonton Electronics Corporation, B-179767, May 16, 1974, 74-1 CPD 258; National Micrographics Systems, Inc., B-196167.2, February 20, 1980, 80-1 CPD 147.

Transiac argues that LeCroy's bid should have been rejected because it did not contain a list of firms or organizations which had previously used or which were presently using the LeCroy transient digitizers. Even though paragraph L-36 did require a bidder offering an "equal" product to furnish such a list to show that the product offered is a "product proven in service by past performance," it is clear from a reading of paragraph L-35 that the IFB contemplated that the contracting agency could consider any information which was "reasonably available to the purchasing activity." Although LeCroy did not submit a list until after bid opening, LeCroy's bid did contain references to use of its products by the Los Alamos National Laboratory. Moreover, the purchasing activity technical personnel were apparently aware of the unit at the Los Alamos National Laboratory prior to bid opening and were satisfied that the item offered was not a developmental or prototype unit. Contrary to the protester's assertions, whether the unit in use at the Los Alamos National Laboratory was loaned rather than purchased and whether it had been sufficiently tested is irrelevant since the IFB did not state that firms or organizations using the product had to purchase them nor did it specify any testing requirements.

Transiac's charge that LeCroy should have been rejected because of its allegedly poor performance and late deliveries on a number of prior contracts is dismissed. This allegation relates to LeCroy's responsibility. This Office does not review protests of an agency's affirmative determination of responsibility unless there is a showing of possible fraud or bad faith or the solicitation contains definitive responsibility criteria which have not been applied. Gull Airborne Instruments, Inc., B-208510.2, April 13, 1983, 83-1 CPD _____; Mars Signal Light Company, B-205235, October 28, 1981, 81-2 CPD 363. None of these circumstances are present here.

Finally, in commenting on the Defense Nuclear Agency's report on its initial protest, Transiac raised several new protest issues--all related to whether LeCroy's transient digitizer met various salient characteristics stated in the IFB. Since these protest issues differ from those issues raised in the initial protest, they must independently satisfy our timeliness requirements. See Southwestern Bell Telephone Company; Northern Telecom, Inc., B-200523.3, B-200523.4, B-200523.5, March 5, 1982, 82-1 CPD 203; Pennsylvania Blue Shield, B-203338, March 23, 1982, 82-1 CPD 272. These later-raised grounds for protest should have been apparent to Transiac upon examination of LeCroy's bid. A public bid opening was held on November 15, 1982, and Transiac protested here with obvious knowledge of the bid's contents. Under our Bid Protest Procedures, a protest must be filed within 10 working days after the basis is known or should have been known. 4 C.F.R. § 21.2(b)(2) (1983). Our Procedures do not contemplate piecemeal presentation or development of protests. Accordingly, these protest issues raised 2 months after the initial protest was filed are not for consideration on their merits and this part of Transiac's protest is dismissed.

For the above reasons, the protest is dismissed in part and denied in part.

for 
Comptroller General
of the United States